Supreme Court, U.S.
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No. 011278

In The

Supreme Court of the United States

JIMMY SHAY RICHARD,

Petitioner,

v.

MIKE HOOKS, INC.,

Respondent.

On Petition For Writ Of Certiorari To The Louisiana Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether federal concerns for uniformity require a Jones Act case tried in state court to have the fact finder's determinations reviewed under federal standards of review rather than Louisiana's more expansive review of facts?

LIST OF PARTIES

Petitioner: Jimmy Shay Richard, through James Steven Broussard, Broussard & Hart, L.L.C.

Intervenors/Petitioners: None

Parent Companies and Subsidiaries: None

Respondent: Mike Hooks, Inc., through James B. Doyle

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Jimmy Shay Richard, petitions for a writ of certiorari to review the judgment of the Louisiana Supreme Court of the State of Louisiana, No. 2001-C-145, entered in this matter on October 16, 2001; rehearing was denied on December 14, 2001.

OPINIONS BELOW

The May 26, 1998 Opinion of the Trial Court is unreported and is reprinted herein, Appendix, 12a, *infra*. The Third Circuit Court of Appeal Opinion dated October 4, 2000 is reported as *Richard v. Hooks*, 99-1631 (La. App. 3rd Cir. 10/4/00), 772 So.2d 148, and is reprinted herein, Appendix, 18a, *infra*. The Louisiana Supreme Court Opinion dated October 16, 2001 is reported as *Richard v. Hooks*, 2001-0145 (La. 10/16/01), 799 So.2d 462, and is reprinted herein, Appendix, 1a, *infra*. The Louisiana Supreme Court also denied rehearing on December 14, 2001 at the same citation as its Opinion. A news release from the Louisiana Supreme Court denying rehearing is reprinted herein, Appendix, 32a, *infra*.

JURISDICTION

The judgment of the Louisiana Supreme Court was entered on October 16, 2001. Petitioner's application for rehearing was denied on December 14, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

This case involves 46 U.S.C. § 688 (Jones Act).

STATEMENT OF THE CASE

Jimmy Shay Richard suffered the traumatic amputation of his right arm at shoulder level when the boom of a crane fell on him. Richard was employed by Mike Hooks, Inc. (hereinafter "Hooks"), and was working aboard one of Hooks' dredges when he was called off the dredge to assist in unloading dredge pipe. During the unloading operation, Richard was struck by the falling boom of a 90 ton crane. Investigation revealed a safety latch designed to prevent such an accident had been wired back, rendering it inoperable. Richard had been working for Hooks as a tacker/welder for 18 months.

Richard filed a Jones Act claim against Hooks in state court. The trial court rendered a written opinion finding seaman status in favor of Richard. The Louisiana Third Circuit Court of Appeal affirmed. The Louisiana Supreme Court granted Hooks' writ application and reversed. Richard's application for rehearing to the Louisiana Supreme Court was denied.

The appropriate standard of appellate review, federal or state, was not an issue until the Louisiana Supreme Court rendered its opinion reversing the trial court. The Louisiana Supreme Court's opinion not only contained a review of the facts, but contained factual findings inconsistent with the record and/or the opinions of the lower

courts. Richard first raised the question of the appropriate standard of review in his application for rehearing to the Louisiana Supreme Court. (App., *infra*, 33a at 36a.) The Louisiana Supreme Court denied Richard's application for rehearing.

REASONS FOR GRANTING THE WRIT

The Louisiana Supreme Court in *Milstead v. Diamond M Offshore, Inc.*, 95-C-2446 (La. 7/2/96), 676 So.2d 89, held that Louisiana appellate standards of review apply in Jones Act cases tried in state court. Unlike the federal standard of review employed in Jones Act cases, Louisiana's Constitution[1] provides for full review of both law and facts.

No state other than Louisiana has standards of appellate review that allow full review of both law and *facts*.

The "Saving to Suitors Clause[2]" allows Jones Act claims to be filed in state court. Maritime law in the United States is federal law. *American Dredging Co. v. Miller*, 510 U.S. 443, 445-46 (1994). State courts exercising concurrent maritime jurisdiction are generally required to apply substantive federal maritime statutory law and to follow maritime jurisprudence from the United States Supreme Court. *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917). The federal concern for uniformity extends to maritime cases. While states may adopt such remedies as

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[1] See Louisiana Constitution of 1974, Art. 5, Secs. 5(c) and 10(b).

[2] 28 U.S.C. § 1333(1).

they see fit for maritime cases tried in state court, these remedies must not work a material prejudice to a characteristic feature of the general maritime law, nor may it interfere with the proper harmony and uniformity of the law in its international and interstate relations. *American Dredging, supra.*

The determination of seaman status is inherently fact intensive, and each case must be decided under the facts presented. *Chandris, Inc. v. Latsis*, 515 U.S. 347, 371 (1995); *McDermott International, Inc. v. Wilander*, 498 U.S. 337, 356 (1991).

The standard of review applied by federal courts exercising admiralty jurisdiction is different from the standard of review followed by Louisiana state courts. In civil cases, Louisiana appellate courts, including the Louisiana Supreme Court, are constitutionally authorized to review facts on appeal.

To the contrary, in a Jones Act case tried in federal court, appellate review of facts is very limited.

> A jury's decision is final if it has a reasonable basis. . . . If reasonable persons, applying the proper legal standard, could differ as to whether the employee was a [seaman], it is a question for the jury. . . . The many cases turning upon the question of whether an individual was a 'seaman' demonstrate that the matter depends largely on the facts of the particular case and the activity in which he was engaged at the time of the injury. *Wilander, supra.*

" . . . A jury's decision is final if it has a reasonable basis, whether or not the appellate court agrees with the jury's estimate." *Senko v. La Crosse Dredging Corp.*, 352

U.S. 370, 374 (1957). In *Guevara vs. Maritime Overseas Corporation*, 34 F.3d 1279 (5th Cir. 1994), the Fifth Circuit stated that the standard of review to be applied to a jury verdict in a Jones Act case is highly deferential. The jury's verdict must stand unless there is a complete absence of probative facts to support it; the court referred to the standard as "lenient." *Guevara*, at 1281. Clearly, the scope of review under Louisiana's standard of review is much greater than allowed under federal standards of review in Jones Act cases.

Further, under federal standards, the Jones Act is recognized as remedial legislation and is to be interpreted in favor of broad coverage. *Cortes v. Baltimore Insular Line, Inc.*, 287 U.S. 367, 375 (1932). Louisiana standards of review contain no similar principle.

Justice Kimball, in her dissent in *Milstead*, noted "the expansive review of fact determinations allowed under Louisiana standards of appellate review, but not available in a similar suit applying the same substantive law in a federal court, works a substantive change to a characteristic feature of general maritime law and is therefore not proper." *Milstead*, 676 So.2d at 94.

The Louisiana Supreme Court's decision in *Milstead* held federal concerns for uniformity do not require a Jones Act case tried in state court be reviewed under federal standards. Whether federal review standards should apply is an important federal question which has not been, but should be, settled by this Court. [Supreme Court Rule 10(c)].

In *Icicle Seafoods, Inc. vs. Worthington*, 475 U.S. 709 (1986), the trial court had found the plaintiffs to be seamen. On appeal, the Ninth Circuit, engaging in factual review, found the plaintiffs "dominant employment" was "industrial maintenance" and the "maritime work" they performed took only a small portion of their time, leading the Ninth Circuit to conclude the plaintiffs were not seamen. This Court granted certiorari and found the Court of Appeal erred in engaging in such fact finding. This Court, at page 714 of its opinion, stated: "[I]t [the Appellate Court] should not simply have made factual findings of its own."

The full review of facts allowed under Louisiana's standard of review is inconsistent with the standard of review employed by this Court in Jones Act cases. Jones Act litigants in Louisiana state courts do not receive the benefit of the great deference afforded the trier of fact in federal courts. Such a distinction can and does lead to a material prejudice to a characteristic feature (great deference to the trier of fact) of the Jones Act. Simply stated, a Jones Act claimant should be entitled to the same standard of review regardless of whether or not his case is tried in federal or state court.

The Louisiana Supreme Court's review of the case sub judice under state standards of review resulted in findings of fact inconsistent with the record and the findings of the trial court. Such at large ramblings would never have occurred under federal standards of review. A Federal Court would have reviewed the record to determine if there was a reasonable basis to support the trial court's decision. In this case, the Louisiana Supreme

Court set out on its own fact finding mission giving no deference whatsoever to the trial court's findings of fact.

The Louisiana Supreme Court's opinion found, at page 2, Richard's work aboard moving vessels occurred once every month for "about 45 minutes to 2 hours in duration," which is contrary to evidence in the record finding Richard's work on moving vessels lasted from 2 hours to a day and a half on each occasion. Further, the Louisiana Supreme Court's opinion, at page 6, found Richard did not eat on the vessels, which is contrary to evidence adduced at trial.

Additionally, the Louisiana Supreme Court's opinion, beginning at the bottom of page 7, found "Richard's employment did not provide him with a connection to defendant's vessels that is substantial in nature and duration." This is a factual finding contrary to factual findings in the lower courts. Richard contends under federal standards of review such a reversal of factual findings would not have occurred. The inquiry into seaman status for purposes of the Jones Act is of necessity fact specific; it will depend on the nature of the vessel and the employee's precise relation to it.[3]

CONCLUSION

Louisiana stands alone in its unique standard of review in Jones Act cases that allows for full appellate review of facts. The Louisiana Supreme Court's opinion

[3] See *Chandris*, at 371.

demonstrates just how far Louisiana Courts are allowed to "roam" in their review of the trial court's findings. Under federal standards, the review in this case would have ended when it was determined there was a reasonable basis to support the trial court's decision.

Louisiana, "the bayou state," is a coastal state with many inland waterways. Jones Act litigants who choose to try their cases in state court should enjoy the same standard of review as other Jones Act litigants. Louisiana's system is contrary to the differential standard afforded to fact finders in federal court. A successful Jones Act litigant is at a distinct disadvantage when his case is reviewed on appeal in Louisiana. This runs contrary to any notion of harmony and uniformity.

For the foregoing reasons, certiorari should be granted.

Respectfully submitted,

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APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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SUPREME COURT OF LOUISIANA

No. 01-C-0145

Jimmy Shay RICHARD

VERSUS

MIKE HOOKS, INC.

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL THIRD CIRCUIT, PARISH OF CALCASIEU

CALOGERO, Chief Justice*

We granted this writ to determine if a tacker/welder's helper, who was injured while working for defendant, Mike Hooks, Inc., is a sea-based maritime employee entitled to Jones Act protection or a land-based worker who happens to spend a portion of his time working on Hooks's vessels. After reviewing the record, we find the latter to be correct, and hold that plaintiff does not qualify as a seaman for purposes of the Jones Act, 46 U.S.C. § 688.

FACTS AND PROCEDURAL HISTORY

Mike Hooks, Inc. is in the dredging business. Jimmy Shay Richard began his employment with Hooks on August 18, 1992, working as a tacker/welder's helper in a dockside yard that was primarily used to repair the vessels and equipment used in Hooks's dredging operations. Richard did not work exclusively on any one project, but

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* Retired Judge Robert L. Lobrano, assigned as Justice *Pro Tempore*, participating in the decision.

Johnson, J. concurs in result.

performed whatever work had to be done in defendant's yard. Richard's duties included picking up scrap iron, unhooking pipe, loading barges, and fabricating items to be used on the vessels. In addition, Richard spent in excess of thirty percent of his time performing direct repair and maintenance to Hooks's vessels including changing out decks, replacing pipes, changing out cables, replacing mufflers and, occasionally, repairing engines.

The vessels that Richard worked aboard were dockside, he was never more than a gangplank's distance from shore while working, and some of the vessels being repaired were partially on land. Richard was not hired as part of the dredging crew that performed repairs on vessels during the dredging operations. He did not eat or sleep on defendant's vessels, nor did he keep watch over them. Richard never worked aboard any dredge during its primary operations, nor did he work on any dredge being moved over navigable water in pursuit of its mission. Richard's only time spent on a moving vessel was once every month or so when he was required to ride in a small boat to assist in moving dredge pipe along a canal adjacent to Hooks's yard. This latter assignment lasted, on average, about forty-five minutes to two hours in duration.

On March 29, 1994, Richard was working on land, off-loading pipe from a truck, when the boom of a loading crane collapsed and fell on his right arm, causing it to be amputated. Richard filed a lawsuit against Hooks in the 14th Judicial District Court seeking recovery under

the Jones Act.[1] *The defendants then filed notice of* removal to the U.S. District Court for the Western District of Louisiana, which thereafter remanded the case back to the state court. After remand, Hooks moved for summary judgment contending that Richard was not a seaman. The trial court denied Hooks's motion, holding that a reasonable jury could conclude that Richard was a seaman.

The case was then bifurcated, with the issue of seaman status being tried first. The trial court held that Richard was a seaman, and certified that judgment as a final one pursuant to Louisiana Code of Civil Procedure Article 1915(B)(1). Hooks appealed and the court of appeal affirmed the trial court's decision that Richard was a seaman, thus entitled to Jones Act benefits.

We disagree. The facts surrounding Richard's employment with Hooks do not warrant a finding that plaintiff was a Jones Act seaman.

LAW AND DISCUSSION

This Court's opinion in *Wisner v. Professional Divers of New Orleans*, 98-1755 (La. 3/2/99), 731 So.2d 200, chronicled some of the historical developments in the law concerning seamen and the Jones Act. While it is not necessary to rehash the history discussed in that case, it is important to discuss the recent United States Supreme Court cases that have addressed the issue of who qualifies as a seaman under the Jones Act, 46 U.S.C. § 688.

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[1] In supplemental petitions, Richard added an intentional tort claim against Hooks and sued the crane manufacturer, Bucyrus-Erie Company and its insurer.

The United States Supreme Court in *Chandris, Inc. v. Latsis*, 515 U.S. 347, 115 S.Ct. 2172, 132 L.Ed.2d 314 (1995), set forth the elements for seaman status as follows: (1) the employee's duties must contribute to the function of the vessel or to the accomplishment of its mission; (2) a seaman must have a connection to a vessel in navigation (or to an identifiable group of such vessels) that is substantial in terms of both its duration and its nature. *See Chandris*, 515 U.S. at 368, 115 S.Ct. at 2190.

The *Chandris* court explained that the first element was intended to exclude from Jones Act protection those individuals who do not perform the ship's work. The court recognized, however, that the threshold requirement is very broad, stating that "all who work at sea in the service of a ship" are eligible for seaman status. *See id.*

The second element, however, is a more narrow inquiry. The *Chandris* court explained the element as follows:

> The fundamental purpose of the substantial connection requirement is to give full effect to the remedial scheme created by Congress and to separate the sea-based maritime employees who are entitled to Jones Act protection from those land-based workers who have only a transitory or sporadic connection with a vessel in navigation, and therefore whose employment does not regularly expose them to the perils of the sea. See 1B A. Jenner, Benedict on Admiralty § 11a, pp. 2-10.1 to 2-11 (7th ed. 1994) ("If it can be shown that the employee performed a significant part of his work on board the vessel on which he was injured, with at least some degree

> of regularity and continuity, the test for seaman status will be satisfied" (footnote omitted)).

Chandris, 515 U.S. at 368-69, 115 S.Ct. at 2190.

The *Chandris* court then provided guidance in ascertaining who is a "member of the crew" and, therefore, a seaman. The court held:

> "[T]he total circumstances of an individual's employment must be weighed to determine whether he had a sufficient relation to the navigation of vessels and the perils attendant thereon." *Wallace v. Oceaneering Int'l*, 727 F.2d 427, 432 (CA5 1984). The duration of a worker's connection to a vessel and the nature of the worker's activities, taken together, determine whether a maritime employee is a seaman because the ultimate inquiry is whether the worker in question is a member of the vessel's crew or simply a land-based employee who happens to be working on the vessel at a given time.
>
> * * *
>
> A maritime worker who spends only a small fraction of his working time on board a vessel is fundamentally land-based and therefore not a member of the vessel's crew, regardless of what his duties are. Naturally, substantiality in this context is determined by reference to the period covered by the Jones Act plaintiff's maritime employment, rather than by some absolute measure.
>
> * * *
>
> A worker who spends less then about 30 percent of his time in the service of a vessel in navigation should not qualify as a seaman under the Jones Act. This figure of course serves as no

> more than a guideline established by years of experience, and departure from it will certainly be justified in appropriate cases. As we have said, "[t]he inquiry into seaman status is of necessity fact specific; it will depend on the nature of the vessel and the employee's precise relation to it." *Wilander*, 498 U.S., at 356, 111 S.Ct., at 818.

Chandris, 515 U.S. at 370-71, 115 S.Ct. at 2190-91.

In 1997, the United States Supreme Court in *Harbor Tug and Barge Co. v. Papai*, 520 U.S. 548, 117 S.Ct. 1535 (1997), further clarified the rule by stating:

> For the substantial connection requirement to serve its purpose, the inquiry into the nature of the employee's connection to the vessel must concentrate on whether the employee's duties take him to sea. This will give substance to the inquiry both as to the duration and nature of the employee's connection to the vessel and be helpful in distinguishing land-based from sea-based employees.

Harbor Tug, 520 U.S. at 555, 117 S.Ct. at 1540.

We begin with the first element of the *Chandris* test, that an employee's duties must contribute to the function of the vessel or to the accomplishment of its mission. The court of appeal held that this element was met, and with this we agree. Richard did perform maintenance and repair work on defendant's vessels that contributed to their function.

We recognize, however, as did the *Chandris* and *Harbor Tug* courts, that the first element of the test is general and that the inquiry of whether an individual is a seaman

will often turn on the second element of the *Chandris* test. That element requires the employee to show "a connection to a vessel in navigation (or to an identifiable group of such vessels) that is substantial in terms of both its duration and its nature." *See Chandris*, 515 U.S. at 368, 115 S.Ct. at 2190.

Regarding the latter element, the court of appeal found that Richard did have a connection to Hooks's vessels that was substantial in duration and nature because, in considering the totality of the circumstances, Richard's work was of a seagoing nature that exposed him to the perils of the sea. The court noted that Richard spent over thirty percent of his time aboard defendant's vessels, that his work contributed to the function of the vessels, and that he was exposed to the perils of the sea in performing those duties. The court referred to the testimony of a marine expert who stated that Richard faced the "perils of the sea" such as "hazards of cargo operations, ship's cranes/booms, slippery decks, sinking vessel, fire hazards, etc."

We agree that Richard had a connection to defendant's vessels, but disagree that the connection was substantial in duration and nature. The fact that Richard spent in excess of thirty percent of his time working on defendant's vessels does not, in and of itself, make him a seaman. Thirty percent is not a magic number automatically rendering an individual's connection with a vessel substantial in duration and nature. Thirty percent is simply a guideline, a minimum below which an individual generally does not qualify as a seaman. Furthermore, the fact that Richard may have been exposed to some perils does not automatically qualify him as a seaman. "Seaman

status is not co-extensive with seamen's risks." *Chandris*, 515 U.S. at 361, 115 S.Ct. at 2186.

Richard's time spent aboard Hooks's vessels and the perils he faced must be considered along with other important facts to determine whether his connection with defendant's vessels are substantial in nature and duration. In this particular instance, we consider an analysis of the following: all of the vessels on which plaintiff worked were dockside; he was never more than a gangplank's distance from shore when working on the vessels; some of the vessels were partially on land while being repaired; he never slept on the vessels; he did not eat on the vessels; he did not keep watch on vessels overnight; he was not a member of Hooks's dredge crew that performed welding on dredges in operation; he never worked on a vessel while it was performing its primary mission; he took his orders from a land-based foreman; he was only aboard small moving vessels once every month, for short durations, where he assisted in moving dredge pipe along a canal adjacent to Hooks's yard; and his repair duties did not take him to sea.[2] While none of

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[2] Richard's limited time spent aboard small boats in a waterway adjacent to Hooks's yard, in our view, does not constitute "going to sea." Whether an employee's duties take him to sea was an inquiry enunciated in *Harbor Tug, supra*. We note that the Federal Fifth Circuit Court of Appeals, in *In re Endeavor Marine, Inc.*, 234 F.3d 287 (5th Cir. 2000), recently determined that the "going to sea" reference in *Harbor Tug* is only helpful in determining whether an individual has the requisite connection to a vessel, that the phrase is not "a new and specific test for seaman status," but simply a shorthand way of saying that "the employee's connection to the vessel regularly exposes him to the perils of the sea." *Id.* at 291. We

these individual facts alone prohibit an employee from attaining seaman status, a consideration of them together shows that Richard was a land-based employee, not a seaman.

Richard has argued that the facts surrounding his employment should not prevent him from attaining seaman status because similar facts were present in four post-*Chandris* cases. Richard cites *Manuel v. P.A.W. Drilling & Well Service, Inc.*, 135 F.3d 344 (5th Cir. 1998); *Burgess v. C.F. Bean Corp.*, 98-3072 (La. App. 4 Cir. 8/18/99), 743 So.2d 251; *Gumpert v. Pittman Construction Co., Inc.*, 98-2269, 99-0709 (La. App. 4 Cir. 6/9/99), 736 So.2d 1026; and *In re Endeavor Marine Inc.*, 234 F.3d (5th Cir. 2000).

While some of the facts in *Manuel, Burgess, Gumpert,* and *In re Endeavor Marine, Inc.* may be similar to some facts in this case, the totality of the circumstances are distinguishable. The determination of seaman status is inherently fact intensive, and each case must be decided under the facts presented therein. *See Chandris*, 515 U.S. at 371, 115 S.Ct. at 2191; *Wilander*, 498 U.S., at 356, 111 S.Ct., at 818. While the courts which decided *Manuel, Burgess, Gumpert,* and *In re Endeavor Marine Inc.* found the plaintiffs therein to be seamen, the facts surrounding Richard's employment, in our view, do not yield the same result.

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agree that the *Harbor Tug* court did not intend to make a hard and fast rule that those individuals who do not "go to sea" can never be classified as seamen. But, whether an individual routinely goes to sea is a factor in determining whether he has a connection to a vessel that is substantial in nature and duration.

The totality of the circumstances surrounding Richard's employment does not provide him with a connection to defendant's vessels that is substantial in nature and duration. The facts indicate that Richard is a land-based employee who happens to spend some of his time working aboard defendant's vessels. Jimmy Shay Richard is not a Jones Act seaman.

For the foregoing reasons, we reverse the finding by the trial court and court of appeal that plaintiff is a seaman entitled to Jones Act benefits, and dismiss this claim with prejudice.

REVERSED; The Jones Act claim is dismissed with prejudice.[3]

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[3] We are satisfied that reversal without a remand is the proper disposition in this matter, given the agreement between the parties as set out in their Joint Stipulation and Motion to Designate Interlocutory Ruling as a Final Judgment. That agreement states as follows:

> With this stipulation, there is no just reason for delay; the only remaining issue, in the event Richard is determined to be a seaman, is the amount of damages, if any, to be awarded; *if Judge Palmer's ruling of May 26, 1998 is reversed, then the entire suit will be dismissed;* and therefore, judicial economy and efficiency is best served by the application of the provisions of La. C.C.P. Art. 1915(B)(1).
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> Rec., vol. 5, p. 1024 (emphasis supplied).

While the plaintiff agreed to a fast-track review of the district court's ruling on his status as a seaman, albeit with the understanding that dismissal of the suit would be the consequence of reversal on appeal of the district court's ruling, the parties also "reserve[d] their right to contest whether damages are due to Jimmy Shay Richard as a result of the

accident sued upon herein, . . . under . . . any . . . plan of Workers' Compensation which might be applicable, and if so, with respect to the amount of such damages." Rec., vol. 5, p. 1024.

While we hold that Richard is not entitled to relief under the Jones Act, we make no comment on whether or not the plaintiff is entitled to benefits under any other state or federal worker's compensation law, or the manner in which he may pursue such benefits. Under the circumstances, we believe it to be appropriate simply to reverse the district court's judgment, thereby deciding the only issue before us in this appeal. We do not intend our dismissal of plaintiff's Jones Act claim to preclude him from seeking any other relief to which he may be entitled.

JIMMY SHAY RICHARD	:	14TH JUDICIAL
VS. NO. 96-230	:	DISTRICT COURT
MIKE HOOKS, INC.	:	PARISH OF CALCASIEU
	:	STATE OF LOUISIANA

* * * CONSOLIDATED WITH * * *

JIMMY SHAY RICHARD	:	14TH JUDICIAL
VS. NO. 96-1854	:	DISTRICT COURT
MIKE HOOKS, INC.	:	PARISH OF CALCASIEU
	:	STATE OF LOUISIANA

* * * CONSOLIDATED WITH * * *

JIMMY SHAY RICHARD	:	14TH JUDICIAL
VS. NO. 96-1862	:	DISTRICT COURT
BUCYRUS-ERIE	:	PARISH OF CALCASIEU
COMPANY, INC	:	STATE OF LOUISIANA

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WRITTEN REASONS FOR JUDGMENT

This cause came up for trial on April 27, 1998, solely on the issue of trial of Jimmy Shay Richard's status as a "seaman" during his employment with Mike Hooks, Inc.

The Court had previously ruled in response to a Motion for Summary Judgment by Mike Hooks, Inc. that reasonable persons could conclude that Jimmy Shay Richard was a "seaman" as a matter of law, and therefore, the Motion for Summary Judgment was denied. This ruling was subsequently upheld by the Louisiana Third Circuit and by the Louisiana Supreme Court who unanimously denied writs.

The Court heard a day of testimony from various present and former Mike Hooks, Inc. employees as well as Mr. Shay [sic] regarding the duties of those working for Mike Hooks, Inc., particularly Mr. Richard.

It is conceded that Mike Hooks, Inc. is a dredging company and that their yard in Westlake, Louisiana is used primarily to repair the various vessels and equipment in furtherance of the dredging work of Mike Hooks, Inc.

Jimmy Shay Richard began his employment with Mike Hooks, Inc. on August 18, 1992 as a Yard Tacker 2". He continued as a Yard Tacker 2 until November 17, 1993 at which time he became a Yard Tacker 1. On March 29, 1994 Mr. Richard was asked to leave his work on a barge and assist on a task of unloading pipe from a truck onto a pipe storage rack located in the Mike Hooks, Inc. yard. No vessel was directly involved in that activity, although the pipe was to be used in connection with dredging operations of Mike Hooks, Inc.

There was a suit instituted against Mike Hooks, Inc. alleging that the duties of Richard were those of a Jones Act Seaman in accordance with 46 U.S.C. subsection 688. This matter was attempted to be removed to Federal Court by Mike Hooks, Inc., and Bucyrus International, Inc. Judge Edwin F. Hunter of the Western District of Louisiana United States District Court ruled that the viability of Richard's Jones Act claim prevented removal and remanded the case to this court. Judge Hunter ruled that Richard's work on the vessels was substantial in nature and that the lack of seagoing experience by Richard is

arguably subsumed by the "vessel in navigation" requirement in *Chandris*.

The Court is satisfied from the testimony that Jimmy Richard's activities confirmed that he spent in excess of thirty percent (30%) of his time aboard vessels doing work that contributed to their function and that Richard was connected to an identifiable group of vessels, those owned by Mike Hooks, Inc., and repaired at the Mike Hooks, Inc. yard in Westlake, Louisiana, and that the vessels were "in navigation" at the time that Richard worked on them.

The cases that we should discuss in relation to this case are Wilander, Chandris, Papai and Manuel. In 1991 the case of *McDermott International, Inc. v. Wilander,* 111 S.Ct. 809, 1991, held that;

> "An employee need not aid in navigation of the vessel in order to qualify as a seaman. The important test is that the employees duly contribute to the function of the vessel or to the accomplishment of its mission."

In *Chandris, Inc. v. Latsis,* 115 S.Ct., 2172, 2190, (1995) case held that;

> "The elements for seaman status were "first an employee's duties must contribute to the function of the vessel or to the accomplishment of its mission; second, a seaman must have a connection to a vessel in navigation (or to an identifiable group of such vessels) that is substantial in terms of both its duration and it's nature."

Even if a persons job description is included in those described under the Longshoreman Harbor Workers Act, (ie Ship Repairer) that does not necessarily exclude him

from Jones Act coverage. *Southwest Marine, Inc. v. Gizone,* 112 S.Ct., 486, Jimmy Slay [sic] apparently did a great deal of work on vessels and the Court finds that based on the testimony he performed at least thirty percent (30%) and likely more of his time working in replacing mufflers, rotten metal including decks and ladders, and removing and replacing engines, *assisting in loading and unloading dredge pipe, assisting in welding of dredge pipe, maneuvering and mooring of the vessel,* removing and replacing engine piping, changing out generators, working on spuds and rigging, and changing out bearings on the vessel, and these duties contributed to the function of the vessel and in accomplishing its mission of either dredging or assisting in the dredging operations of Mike Hooks, Inc.

Chandris' "in navigation" requirement, the Court believes replaced the old "at sea requirement" under previous Jones Act cases and clearly broadened the group of people who might qualify as Jones Act Seaman. In Papai, *Harbor Tug and Barge Company v. Papai,* 117 S.Ct., 1513, 1542, 1997, the Court defined a "identifiable group of vessels" as one subject to common ownership or control in line with the ruling of *Bertrand v. International Mooring and Marine,* 700 F.2d, 240. In Papai, seaman status was denied because it was determined that Papai did not have connection with an identifiable group of vessels. In Papai, Mike Hooks, Inc. urged in the dictum requirement that the worker's duties "take him to sea" is not persuasive in view of the main holding of Wilander and Chandris which show that the job duties should meet the requirements of substantial connection to a vessel or group of vessels in navigation. Mr. Richard meets these requirements.

In *Manuel v. P.A.W. Drilling & Well Service, Inc.*, 135 Fed. 3d 344, (5th Cir. 1998), the issue was more whether or not Rig 3 was a vessel and that if not a vessel, Manuel was not a seaman. The Court of Appeal overturned the District Court ruling that Rig 3 was not a vessel and ruled that Manuel's duties contributed to the function of the rig, and therefore, he was a seaman.

Therefore, having heard all the testimony and considering the aforementioned cases, find that Jimmy Shay Richard had duties which contributed to the function of a vessel or to the accomplishment of its mission, and that he had a connection to an identifiable group of vessels which were in navigation and that the connection to the group of vessels was substantial in both duration and nature.

Because of the previous agreement of counsel when this matter was originally set for trial on status, this matter will not be designated as a "Final Judgment".

Judgment rendered this the 26th day of May, 1998 in Lake Charles, Louisiana, Parish of Calcasieu.

/s/ David Painter
DAVID PAINTER, Judge,
14th Judicial District Court,
Division "B"

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JIMMY SHAY RICHARD	*	**NUMBER 99-1631**
	*	**COURT OF APPEAL**
VERSUS	*	**THIRD CIRCUIT**
MIKE HOOKS, INC.	*	**STATE OF LOUISIANA**

CONSOLIDATED WITH

JIMMY SHAY RICHARD	*	**NUMBER 99-1632**
	*	**COURT OF APPEAL**
VERSUS	*	**THIRD CIRCUIT**
MIKE HOOKS, INC.	*	**STATE OF LOUISIANA**

CONSOLIDATED WITH

JIMMY SHAY RICHARD	*	**NUMBER 99-1633**
	*	**COURT OF APPEAL**
VERSUS	*	**THIRD CIRCUIT**
BUCYRUS-ERIE COMPANY, INC. et al.	*	**STATE OF LOUISIANA**

APPEAL FROM THE
FOURTEENTH JUDICIAL DISTRICT COURT
PARISH OF CALCASIEU, NO. 96-230,
95-1854, and 95-1863,
HONORABLE DAVID PAINTER, DISTRICT JUDGE

JOHN D. SAUNDERS
JUDGE

(Court composed of John D. Saunders, Jimmie C. Peters, and Michael G. Sullivan, Judges.)

SULLIVAN, J., DISSENTS AND ASSIGNS WRITTEN REASONS.

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AFFIRMED.

SAUNDERS, Judge.

This appeal arises from the trial court's determination that the plaintiff, Jimmy Shay Richard, is a seaman under the Jones Act, 46 U.S.C. App. § 688. The defendant, Mike Hooks, Inc., brings this appeal challenging the trial court's finding. For the following reasons, we affirm the judgment of the trial court.

FACTS

The facts of this case are not disputed by the parties. Hooks is in the business of dredging and marine salvage. It owns five dredge boats, three boosters, seven large tugs, ten to twelve dredge tenders, four to five barges for each dredge, some welding barges, and some skiffs. From August 18, 1992, until March 1993, Richard worked as a welder's helper for Hooks at its dockyard in Westlake, Louisiana. He was scheduled to work five days a week, nine hours a day, but often worked overtime and on weekends. He punched a clock when he arrived at or left Hooks' yard.

Richard performed all of his work at Hooks' yard. As a tacker or welder's helper, he worked with a fitter or a fitter/welder. A portion of his work involved making repairs to and maintaining the vessels used in Hooks' operations. Most repairs that were required to maintain Hooks' fleet of vessels were performed at the yard in Westlake. The vessels were docked at Hooks' facility while the repairs or maintenance work was being performed. Richard's work included fabricating and changing mufflers, replacing portions of decks and motor mounts, and fabricating and changing the sides or bumper rails on the hulls of the vessels. He accompanied the fitter to whom he was assigned onto the vessels for the repairs or maintenance work.

During repairs, Richard would go back and forth from the vessel to the shore to retrieve materials and supplies for the work being performed. Frequently, replacement parts were fabricated in the yard and brought onto the vessels for installation. Equipment was

also fabricated and installed on the vessels simultaneously. A walkway from the shore to the vessels provided access for the employees to the vessels.

Richard performed repairs or maintenance work on only stationary vessels that were docked at the yard. The only time he was on a vessel that was not stationary was approximately every month or so when he was required to get on a small boat to assist in moving dredge pipe that had been welded together in Hooks' yard down an adjacent waterway. This would require anywhere from forty-five minutes to two hours. Richard never traveled to a working vessel to perform repairs, and he never ate or slept on a vessel.

Richard's position also required that he do work around the yard, such as picking up scrap iron, unhooking pipe, and unloading barges. He was injured while unloading materials from a truck when the boom of a crane being used to assist in the unloading fell on him, amputating his arm and causing other serious injuries.

This matter was bifurcated, and only the issue of seaman status was tried to the trial court. The trial court concluded that, due to the nature and extent of his work on Hooks' vessels, Richard was a seaman. The judgment was designated as a final judgment pursuant to La.Code Civ.P. art. 1915(B).

LAW OF THE CASE

Prior to trial, Hooks filed a motion for summary judgment asserting that it was entitled to summary judgment on the issue of seaman status. The trial court denied

the motion, finding "a reasonable jury could conclude that JIMMY SHAY RICHARD was a 'seaman' as a matter of law." Hooks applied for writs to this court and to the supreme court which were denied. Richard argues that because Hooks' writ applications were denied, the trial court's reasons for denying summary judgment became the law of the case which cannot be reviewed on appeal. We do not agree.

> A denial of supervisory review is merely a decision not to exercise the extraordinary powers of supervisory jurisdiction, and does not bar reconsideration of, or a different conclusion on, the same question when an appeal is taken from a final judgment. *Sattar v. Aetna Life Ins. Co.*, 95-1108 (La.App. 4 Cir. 3/20/96), 671 So.2d 550. Further, the principle of "law of the case" is discretionary. It has been held that where a prior disposition is clearly erroneous and will create a grave injustice, it should be reconsidered. *Turner v. Pelican*, 94-1926 (La.App. 4 Cir. 9/15/95), 661 So.2d 1065, *writ denied*, 95-25[1]3 (La.12/15/95), 664 So.2d 441.

Dupre v. Maynard, 96-1183, pp. 3-4 (La.App. 1 Cir. 3/27/97); 692 So.2d 36, 38, *writ denied*, 97-1508 (La. 9/26/97); 701 So.2d 986.

STANDARD OF REVIEW

The question of seaman status under the Jones Act is a mixed question of law and fact. *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 111 S.Ct. 807 (1991). Louisiana courts of appeal apply the manifest error standard of review in Jones Act cases. *Milstead v. Diamond M Offshore, Inc.*, 95-2446 (La. 7/2/96); 676 So.2d 89; *Day v. Touchard*,

Inc., 97-1180 (La.App. 5 Cir. 5/27/98); 712 So.2d 1072. *Gaston v. G & D Marine Servs., Inc.*, 93-182 (La.App. 4 Cir. 1/19/94); 631 So.2d 547, *writ denied*, 94-436 (La. 4/4/94); 635 So.2d 1112.

While factual determinations by the trier of fact are given great deference on appeal, if the trial court's decision was based on an erroneous application of law, rather than a valid exercise of discretion, the trial court's decision is not entitled to the deference it would otherwise enjoy. *Lasha v. Olin Corp.*, 625 So.2d 1002 (La. 1993); *We Sell Used Cars, Inc. v. United Nat'l Ins. Co.*, 30,671 (La.App. 2 Cir. 6/24/98); 715 So.2d 656.

ISSUES

Hooks does not dispute the trial court's findings of fact. Instead, it asserts that the trial court's application of the law to the facts was erroneous. Hooks argues that Richard does not meet all of the criteria required for seaman status. It assigns three issues for review, all of which can be summarized as: was the nature of Richard's relationship to Hooks' fleet of vessels sufficient for him to be a seaman?

DISCUSSION

The Jones Act provides a remedy for "[a]ny seaman" injured in the "course of his employment." 46 U.S.C.App. § 688. The following test for determining whether a maritime employee is a seaman has evolved through the jurisprudence of the United States Supreme Court: 1) "an employee's duties must 'contribut[e] to the function of

the vessel or to the accomplishment of its mission,' " *Wilander*, 498 U.S. at 355, 111 S.Ct. at 817; 2) a seaman must have a connection to a vessel in navigation (or to an identifiable group of such vessels) that is substantial both in terms of its duration and nature, *Chandris, Inc. v. Latsis*, 515 U.S. 347, 115 S.Ct. 2172 (1995); and 3) the "substantial connection to a vessel or a fleet of vessels, . . . requires a requisite degree of common ownership or control," *Harbor Tug and Barge Co. v. Papai*, 520 U.S. 548, 560, 117 S.Ct. 1535, 1542-43 (1997).

The Supreme Court recognized in *Chandris*, 515 U.S. at 364, 115 S.Ct. at 2188, that its "cases [were] largely silent as to the precise relationship a maritime worker must bear to a vessel in order to come within the Jones Act's ambit." Before addressing the relationship required for Jones Act status, the Court reviewed and considered the impact of early seaman status jurisprudence on the development of the basic principles defining a seaman, as well as its impact on the passage of the U.S. Longshore & Harbor Workers Compensation Act (33 U.S.C.A. § 901, *et seq.*) (LHWCA) finding:

> Our Jones Act cases establish several basic principles regarding the definition of a seaman. First, "[w]hether under the Jones Act or general maritime law, seamen do not include land-based workers." . . . Through the LHWCA, therefore, Congress "explicitly den[ied] a right of recovery under the Jones Act to maritime workers not members of a crew who are injured on board a vessel." And this recognition process culminated in *Wilander* with the Court's statement that, "[w]ith the passage of the LHWCA, Congress established a clear distinction between

> land-based and sea-based maritime workers. The latter, who owe their allegiance to a vessel and not solely to a land-based employer, are seamen."

Id. at 358-359, 115 S.Ct. at 2185 (citations omitted).

Chandris continued the distinction between land-based and sea-based maritime workers with regard to seaman status. For the Court, an important focus of seaman status was the *"essence of what it means to be a seaman,"* and it explained:

> The Jones Act remedy is reserved for sea-based maritime employees whose work regularly exposes them to "the special hazards and disadvantages to which they who go down to sea in ships are subjected.". . . . In our view, *"the total circumstances of an individual's employment must be weighed to determine whether he had a sufficient relation to the navigation of vessels and the perils attendant thereon."* The duration of a worker's connection to a vessel and the nature of the worker's activities, taken together, determine whether a maritime employee is a seaman because the ultimate inquiry is whether the worker in question is a member of the vessel's crew or simply a land-based employee who happens to be working on the vessel at a given time.

Id. at 369-70, 115 S.Ct. at 2190-91 (citations omitted) (emphasis added).

Thus, the fact that a maritime employee is injured while on a ship at sea as part of his employment does not qualify him as a member of the vessel's crew, and a maritime employee need not work only on a vessel to qualify as a seaman. Furthermore, a ship repairman is not

limited to a remedy under the LHWCA simply because that term is enumerated as an occupation within the LHWCA. *Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81, 112 S.Ct. 486 (1991).

The Court determined that the total circumstances of employment consideration necessarily have a temporal element to them and adopted the general rule developed by the United States Fifth Circuit, Court of Appeals, which requires that a worker spend thirty percent or more of his time "in the service of a vessel in navigation" to qualify as a Jones Act seaman. *Chandris*, 515 U.S. at 371, 115 S.Ct. at 2191. While the *Chandris* court qualified its adoption of the thirty percent temporal element, it explained "seaman status is not *merely* a temporal concept." *Id.* This qualification is in line with the Fifth Circuit's application of the thirty percent general rule. *See Easley v. Southern Shipbuilding Corp.*, 965 F.2d 1, 5 (5th Cir. 1992) (where the court stated: "We do not imply that the quantum or percentage of a worker's time spent on a vessel in navigation is either the sole factor or the determinative factor in the search for seaman status."), *cert. denied*, 506 U.S. 1050, 113 S.Ct. 969 (1993).

Richard argues that he is a seaman because thirty percent of his work was performed on vessels in navigation. While this is true we must also address the second prong of the substantial connection requirement: a maritime employee's connection must also be substantial in *nature*. In this regard, we first consider the Court's discussion in *Papai*, 520 U.S. 555, 117 S.Ct. 1540, which considered a seaman's exposure to " 'the perils of the sea.' " *Papai* began with a review of the substantial connection requirement:

> For the substantial connection requirement to serve its purpose, *the inquiry into the nature of the employee's connection to the vessel must concentrate on whether the employee's duties take him to sea.* This will give substance to the inquiry both as to the duration and nature of the employee's connection to the vessel and be helpful in distinguishing land-based from sea-based employees.

Id. at 555, 117 S.Ct. at 1540 (emphasis added).

To determine whether Richard had a connection with Hooks' vessels that was substantial in duration and nature, we consider Richard's total employment relationship with Hooks. *See Chandris*, 515 U.S. 347, 115 S.Ct. 2172. This requires that we consider whether Richard's work was of a sea-going nature which exposed him to the perils of the sea. *See id Chandris; Papai*, 520 U.S. 548, 117 S.Ct. 1535. The record supports that Richard satisfied the requirement of *Wilander*, 498 U.S. 337, 111 S.Ct. 807, that his work contributed to the function of the vessels on which he worked. Richard also satisfied the thirty percent temporal element of the substantial connection requirement. Framing the inherent risks involved in the work Richard performed, Richard produced a marine expert who gave testimony detailing the kinds of "perils of the sea" that Richard faced during his work for Hooks, including hazards of cargo operations, ship's cranes/booms, slippery decks, sinking vessel, fire hazards, etc. If the perils attendant to the duration of a worker's relation to a vessel are essential to the substantial relation requirement, we find this element of the *Chandris* test met. We emphasize that the query of whether Richard faced any such perils, engaging his status as a Jones Act seaman,

can be determined only upon a fact-intensive examination which considers " 'the total circumstances of an individual's employment . . . weighed to determine whether he had a sufficient relation to the navigation of vessels and the perils attendant thereon.' " *Chandris*, 515 U.S. at 370, 115 S.Ct. at 2190. This purely factual finding necessarily falls within the providence of the fact finder. Accordingly, where finders of fact may disagree, reasonable inferences of fact must not be disturbed on review. *Arceneaux v. Domingue*, 365 So.2d 1330 (La. 1978).

Thus, we find no error in the factual determination made by the trial court, nor do we find any legal error leading to the conclusion that Richard was a seaman under the Jones Act. Accordingly, we affirm the judgment of the trial court. All costs of this appeal are assessed to Mike Hooks, Inc.

AFFIRMED.

Sullivan, J., dissenting:

I respectfully dissent.

In *Chandris, Inc. v. Latsis*, 515 U.S. 347, 369, 115 S.Ct. 2172, 2190 (1995), the United States Supreme Court maintained the status-based inquiry of its earlier cases, while "recogniz[ing] that *seaman status . . . should not be some immutable characteristic that maritime workers who spend only a portion of their time at sea can never attain.*" *Id.* at 373, 115 S.Ct. 2192 (emphasis added). I find implicit in this statement a requirement that to qualify as a seaman a

maritime worker, whether land-based or sea-based, must spend a portion of his time at sea. I believe this concept is inherent in the Jones Act and the jurisprudence interpreting it.

In *Harbor Tug and Barge Co. v. Papai*, 520 U.S. 548, 555, 117 S.Ct. 1535, 1540 (1997), the Supreme Court further discussed the substantial connection requirement of *Chandris*, explaining that "the inquiry into the nature of the employee's connection to the vessel must concentrate on whether the employee's duties take him to sea." *Papai*, 520 U.S. 555, 117 S.Ct. 1540. According to the Court, this requirement "give[s] substance to the inquiry both as to the duration and nature of the employee's connection to the vessel and [is] helpful in distinguishing land-based from sea-based employees." *Id.* at 1543. The majority herein quotes the substantial connection requirement as stated by the Supreme Court in *Papai;* however, it disregards the Court's instruction to concentrate on whether Richard's duties took him to sea. Instead, it considers only whether Richard was subjected to some of the "perils of the sea" that a seaman faces.

Initially in *Papai*, the Supreme Court determined that the vessels on which Papai had worked did not qualify as a fleet of vessels because there was no common ownership or control, thus, he was not entitled to seaman status. Thereafter, the Court considered whether his work on vessels owned by Harbor Tug was sufficient for seaman status. The Court's discussion of the facts in this context is pertinent to my conclusion herein.

Papai was injured while painting on the tug Pt. Barrow, which was operated by Harbor Tug. His assignment

was expected to last for one day and would not involve sailing with the vessel. Over the two and one-half months prior to his injury, Papai had been employed by Harbor Tug on twelve prior occasions; he had worked on the Pt. Barrow on three or four occasions. The Court noted that Papai's "actual duty on the Pt. Barrow throughout the employment in question did not include any seagoing activity; . . . and he was not going to sail with the vessel after he finished painting it." *Id.* at 559, 117 S.Ct. at 1542. The Court determined that Papai's engagements on the Pt. Barrow which "*involved only maintenance work while the tug was docked,*" were not substantial for seaman-status purposes. *Id.*, 117 S.Ct. at 1543.

The Court also considered Papai's occasional work on other Harbor Tug vessels. Papai testified that seventy percent of the work he had performed on those occasions was deckhand work. Even though deckhand work is traditionally seaman work, the Court concluded that it was insufficient for seaman status, stating:

> Coupled with the fact that none of Papai's work aboard the Pt. Barrow was of a seagoing nature, it would not be reasonable to infer from Papai's testimony that his recent engagements with Harbor Tug involved work of a seagoing nature. . . .

Id. at 560, 117 S.Ct. at 1542.

The vast majority of Richard's work was maintenance repair work performed dockside. His occasional, short excursions on small boats to move pipe a short distance from the Hooks' yard was a very small part of his work. He was not a member of the crew of a vessel; his work was not of a "seagoing nature." The fact that his work

dockside may have subjected him to some of the same perils faced by seamen is not, in my opinion, substantial for seaman-status purposes.

The majority determine that the trial court's determination was a purely factual finding which cannot be overturned on appeal if they are reasonable. I do not agree. The trial court did not apply the proper legal standard regarding the nature of Richard's work, thus, its findings of fact are not entitled to deference.

For these reasons, I respectfully dissent.

SAUNDERS, Judge.

For reasons discussed in *Jimmy Shay Richard v. Mike Hooks, Inc.*, 99-1631 (La.App.3 Cir. ___/___/00___); ___ So.2d ___, the judgment in this matter is affirmed. All costs of this proceeding are assessed against the defendant, Mike Hooks, Inc.

AFFIRMED.

Supreme Court of Louisiana

FOR IMMEDIATE NEW RELEASE NEW RELEASE # 099

FROM: CLERK OF THE SUPREME COURT OF LOUISIANA

On the ***14th day of December, 2001,*** the following action was taken by the Supreme Court of Louisiana in the case(s) listed below:

REHEARING(S) DENIED:

200#-C-0145 JIMMY SHAY RICHARD v. MIKE HOOKS, INC. C/W JIMMY SHAY RICHARD V. MIKE HOOKS, INC. C/W JIMMY SHAY RICHARD v. BUCYRUS-ERIE COMPANY, INC. ET AL. (Parish of Calcasieu)

SUPREME COURT

STATE OF LOUISIANA

DOCKET NO. 2001-C-145

JIMMY SHAY RICHARD,

PLAINTIFF/APPLICANT

VERSUS **CIVIL**

MIKE HOOKS, INC.,

DEFENDANT/RESPONDENT

THIRD CIRCUIT COURT OF APPEAL
DOCKET NO. 99-1631
CONSOLIDATED WITH 99-1632 AND 99-1633

ON APPEAL FROM THE
FOURTEENTH JUDICIAL DISTRICT COURT
PARISH OF CALCASIEU
STATE OF LOUISIANA
DOCKET NO. 96-230
CONSOLIDATED WITH 95-1854 AND 95-1863

APPLICATION FOR REHEARING ON BEHALF OF PLAINTIFF/APPLICANT, JIMMY SHAY RICHARD

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STATEMENT OF THE CASE

Jimmy Shay Richard, applicant, was changing decking on a dredge when he was called off to assist in offloading dredge pipe from a truck. During the operation, a crane boom fell on **Richard,** amputating his right arm at the shoulder level. **Richard** obtained a Judgment in the Trial Court finding him to be a Jones Act seaman, which decision was affirmed by the Louisiana Third Circuit Court of Appeal. By Opinion dated October 16, 2001, this Honorable Court reversed the finding of seaman status with prejudice.

REASONS FOR REQUESTING REHEARING

1.

THIS HONORABLE COURT IGNORED FEDERAL JONES ACT STANDARD OF REVIEW (SEE *TRAHAN*) AND ITS OWN *"STOBART"* STANDARD OF REVIEW

The determination of seaman status is inherently fact intensive, and each case must be decided under the facts presented therein. *Chandris, Inc. v. Latsis,* 515 U.S. 347, at 371, 115 S.Ct. 2172, at 2191, 132 L.Ed2d 314 (1995); *McDermott International, Inc. v. Wilander,* 498 U.S. 337, at 356, 111 S.Ct. 807, at 818, 112 L.Ed.2d 886 (1991); this Court's Opinion, p. 7.

The standard of review applied by Federal Courts exercising admiralty jurisdiction is different from the standard of review followed by Louisiana State Courts. Louisiana State Courts are constitutionally authorized to review facts on appeal, under the manifest error standard.

To the contrary, in a Jones Act case tried in Federal Court, there is no review of facts under a manifest error standard. "A jury's decision is final if it has a reasonable basis. . . . If reasonable persons, applying the proper legal standard, could differ as to whether the employee was a [seaman], it is a question for the jury. . . . The many cases turning upon the question of whether an individual was a 'seaman' demonstrate that the matter depends largely on the facts of the particular case and the activity in which he was engaged at the time of the injury." *Wilander,* supra. ". . . . A jury's decision is final if it has a reasonable basis, whether or not the Appellate Court agrees with the jury's estimate." *Senko v. La Crosse Dredging Corp.*, 352 U.S. 370, at 374, 77 S.Ct. 415, at 417, 1 L.Ed.2d 404 (1957).

This Honorable Court's Opinion makes it clear that as review of the facts was conducted. This Court found that **Richard** did not eat on defendant's vessels.[1] This finding is contrary to the testimony of Freddie Cowan, a longtime **Hooks'** employee, who testified that **Richard** sometimes ate his lunch prepared by the dredge cooks on the dredge.[2]

This Court found that **Richard** worked on moving vessels once every month for "about 45 minutes to two hours in duration."[3] To the contrary, there was testimony in the record demonstrating that **Richard's** work on

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[1] Opinion, p. 2, ¶ 1, p. 6, ¶ 2.

[2] V. 5, p. 1097.

[3] Opinion, p. 2, ¶ 1.

moving vessels lasted anywhere from a few hours up to a day and a half.[4] This is a significant difference.

These two adverse findings by this Honorable Court cannot be said to be unimportant. They were included in the factual findings used by this Court in reversing **Richard's** judgment of seaman status.[5]

The fact that this Honorable Court reviewed facts and made its own factual findings, indicates clearly that federal standards of review for Jones Act cases were not followed. This Honorable Court has previously held that federal standards of review should be followed in reviewing Jones Act cases tried in State court. *Trahan v. Gulf Crews*, 255 So.2d 63 (La. 1971).

In the case of *Milstead v. Diamond M. Offshore, Inc.*, 95-2446 (La. 7/2/960, 676 So.2d 89, this Honorable Court held Louisiana law applied to standards of review in a Jones Act case tried in State Court. It is respectfully submitted that considering that the Jones Act is Federal legislation coupled with the requirement for uniformity in the federal law, federal standards of review should apply to Jones Act cases tried in State Court. In *Milstead*, supra, this Court, at page 94, noted that uniformity is the key consideration in determining whether state laws apply in maritime cases. Justice Kimball, in her dissent in *Milstead*, noted ". . . . the expansive review of fact determinations allowed under Louisiana standards of appellate review, but not available in a similar suit applying

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[4] V. 2, p. 395, V. 5, pp. 1101-1103, 1109-1110, 1133, 1170-1171.

[5] Opinion, p. 6, ¶ 2.

the same substantive law in a Federal Court, works a substantive change to a characteristic feature of general maritime law and is therefore not proper."

Even assuming that the proper standard of review is Louisiana's marifest error standard, this Honorable Court made adverse findings of fact without finding any manifest error below.

In order to reverse a fact finder's determinations of fact, an Appellate Court must review the record in its entirety and meet the following two-part test as set out by Chief Justice Calogero in *Stobart v. State, Through DOTD*, 617 So.2d 880, 882 (La. 1993):

1) An Appellate Court must find from the record that a reasonable factual basis does not exist for the finding of the Trial Court; and

2) The Appellate Court must further determine that the record establishes that the fact finder is clearly wrong (manifestly erroneous).

Where two permissible views of the evidence exists, the fact finder's choice between them cannot be manifestly erroneous or clearly wrong. *Stobart* at 883. Reversal is warranted only in those rare cases where the record contains little or no evidence to support the Trial Court's conclusions. *Stobart; Youn v. Maritime Overseas Corp.*, 623 So.2d 1257 (La. 1993); *Vaughan Contractors, Inc. v. Cahn*, 629 So.2d 1225, at 1228 (La. App. 3rd Cir. 1993).

Even though Chief Justice Calogero wrote the Opinion in *Stobart*, this Court's Opinion, reversing both the Trial and Appellate Court, contains no analysis in accord

with the two-part test set out by this Court in *Stobart*. In fact, this Court's opinion makes absolutely no mention of the standard of review which was applied. Further, the decision is absolutely void of any discussion, much less application, of the manifest error standard.

It is respectfully submitted that this Honorable Court erred in applying Louisiana state law standards of review. Further, a review of the Trial Court's decision under federal standards would result in the Trial Court's Judgment being affirmed.

On the other hand, should this Court find that Louisiana law standards of review apply, then the guidelines for applying the manifest error standard were not followed. Even under Louisiana's standard of review, a reviewing Court should view all evidence in the light most favorable to the party who prevailed in the Trial Court. See Judge Lemmon's concurring Opinion in *Ambrose v. N.O. Police Dept. Ambulance Serv.*, 639 So.2d 216 (La. 1994). This Honorable Court's Opinion contained two findings of fact adverse to **Richard**, which is a clear indication that the evidence was not viewed in the light most favorable to **Richard**, who prevailed in the Court's below.

2.

A MOORED VESSEL IS "IN NAVIGATION" AS MUCH AS A VESSEL "AT SEA"

While finding "at sea" not to be an absolute requirement for seaman status, this Court obviously gave considerable weight to the fact that **Richard** never sailed to sea. It is submitted that it was error for this Court to give

any weight to such a requirement when **Richard** did more than 30% of his work aboard vessels "in navigation." The following cases demonstrate that it was error for this Court to give any adverse weight to the fact that **Richard** did not sail to sea, to-wit:

Southwest Marine, Inc. v. Gizoni, 502 U.S. 81, 112 S.Ct. 486, 116 L.Ed.2d 405 (1991) – Gizoni only worked on moored platforms which he used as a work station to perform ship repairman's work. (**Richard** was a ship repairman.)

Senko, supra – Senko always worked on a dredge that was moored at a dock. Never, not once, did he sail. He was injured on land.

Burgess v. C.F. Bean Corp., 98-3072 (La. App. 4th Cir. 8/18/99), 743 So.2d 251, writ denied, 750 So.2d 991 (La. 1999) – Burgess always worked on a dredge when it was moored at a dock. He never once sailed. He was hurt on land (just like **Richard**) when he went off the dredge to help offload dredge pipe.

In Re: Endeavor Marine, 234 F.3d 287 (5th Cir. 12/11/00) – Plaintiff worked from moored vessels. He moved with the vessel from one location to another only *once* in his eighteen months of employment. The Fifth Circuit reversed defendant's Summary Judgment and found claimant to be a seaman as a matter of law.

Manuel v. P.A.W. Drilling & Well Serv., Inc., 135 F.3d 344 (5th Cir. 1998) – Manuel always worked on a jack up rig while in a jacked up position. He never once sailed with the vessel. The Fifth Circuit reversed Summary

Judgment for the defendant and found Manuel to be a seaman as a matter of law.

Gumpert v. Pittman Construction Co., Inc., 98-2269 (La. App. 4th Cir. 6/9/99), 736 So.2d 1026 – This case involved plumbers who worked on a raft tied up underneath a dock. There was no "at sea," and they worked a "gang-planks" distance from land.

Lunsford v. Fireman's Fund Ins. Co., 635 F.Supp. 72 (E.D. La. 1986) – Plaintiff was the maid who only worked on the yacht when it was docked.

Vowell v. G & H Towing Co., 870 F.Supp. 162 (S.D. Tex. 1994) – This was the mechanic who worked on docked vessels and only occasionally made test rides; he was injured on land.

While subtle distinctions can be found between the cited cases and the case sub judice, the distinctions are not sufficient to warrant a different result, especially to reverse a Trial Court's Judgment.

This Honorable Court's Opinion placed significant weight on the fact that **Richard's** work was often on docked vessels only a "gangplank" distance from shore. The Court overlooks the fact that most of the plaintiffs in the above summary cases, likewise only worked on docked/moored vessels that were a "gangplank" from a shore. In fact, the plaintiffs in *Senko, Burgess, Manuel, Endeavor, Gizone* and *Lunsford never* sailed, which is contrary to **Richard**, who did work on moving vessels approximately once a month for a few hours to one and one-half days at a time.

It is respectfully urged that this Honorable Court compare the facts of *Senko* and *Burgess* to the case sub judice, and it will be seen that the cases are the same. Certainly, it is submitted there is no distinction that would warrant overturning a Trial Court Judgment.

As concerns "gangplank," even **Hooks'** dredge captain admitted that the dredges usually work so close to shore that they can step off the dredge onto the bank, i.e., a gangplank's distance.[6]

The real question is not whether **Richard** worked only a "gankplanks" distance from shore, but whether the vessels upon which he worked were in navigation. *Chandris* answers this question in the clear affirmative. In fact, during argument before this Honorable Court, **Hooks'** counsel acknowledged in response to a question from Justice Calogero that the vessels upon which **Richard** worked were "in navigation."

This Court's Opinion in *Wisner*[7] talked at length about the importance of a claimant facing the perils of the sea in order to qualify for seaman status. Even though **Jimmy Richard** put on uncontradicted testimony from a retired Coast Guard Commander that he faced the perils of the sea, this Court apparently gave very little, if any, weight to that testimony. Essentially, the Court seemed to ignore the fact that **Richard** worked on vessels that were "in navigation" and faced the perils of the sea and,

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[6] V. 4, p. 755.

[7] *Wisner v. Professional Divers of New Orleans*, 98-1755 (La. 3/2/99), 731 So.2d 200.

instead, substituted its own judgment as to who is a seaman.

It should be noted that in questioning from Justice Johnson during Oral Argument, counsel for **Hooks** acknowledged that **Richard** satisfies all of the elements of the *Chandris* test, except **Hooks'** counsel claimed that **Richard** lacked "vessel attachment." "Vessel attachment" is not a part of the *Chandris* test. In fact, the question of "vessel attachment" being a requirement for seaman status was directly addressed by this Honorable Court in *Folse v. Western Atlas Intern., Inc.*, 593 So.2d 341 (La. 1992). In a unanimous Opinion, the *Folse* Court held that "vessel attachment" was not a required element for seaman status. Thus, **Hooks** counsel effectively acknowledged that **Richard** met all of the elements of the *Chandris* test.

CONCLUSION

A Rehearing should be granted so this case can be reviewed under the federal standards of review, or, in the alternative, so this Court can follow the *Stobart* test for review under the manifest error standard.

Further, a Rehearing should be granted so this Court can reconsider the adverse findings of fact that were made and, especially, whether or not the standard of review justified making these adverse findings.

Lastly, Rehearing should be granted so this Court can reconsider the emphasis it placed upon "at sea" and "gangplank."

Jimmy Shay Richard suffered the amputation of his right arm at the shoulder; this fact does not make him a

seaman. However, it should be reason enough to be absolutely certain that the Judgment of the lower Court was properly reviewed. **Richard** deserves to know the standard of review employed and particularly the evidence relied upon by this Honorable Court to make two adverse factual findings.

RESPECTFULLY SUBMITTED:

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CERTIFICATE

I hereby certify that a copy of the above and foregoing Application for Rehearing has this day been served upon all parties in this cause by sending same United States Mail, postage prepaid and properly addressed.

Lake Charles, Louisiana, this 29th day of October, 2001.

/s/ Steven Broussard
STEVEN BROUSSARD

MOTION FOR CLARIFICATION

In the event this Honorable Court denies **Jimmy Shay Richard's** Application for Rehearing, it is respectfully requested that the Court clarify the standard of review employed by the Court in this matter. **Richard** further requests clarification as to whether or not the standard of review employed by this Court would have been any different had the Trial below been by Jury instead of Judge. Further, it is respectfully requested that the Court clarify or indicate the basis upon which it found that **Richard** never ate upon the dredges and the finding that **Richard** only worked upon moving vessels once a month for "45 minutes to 2 hours at a time."

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